FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1253

THE STATE OF MINNESOTA, by WARREN SPANNAUS, its Attorney General,

Petitioner,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Respondent.

No. 77-1265

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,

Petitioner,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

REPLY BRIEF FOR PETITIONER THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS

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INTRODUCTION

Essentially all of the substantive arguments raised in the Brief of Respondent have already been discussed in Petitioner's earlier Brief on the merits. Respondent has, however, raised three collateral issues not previously articulated to this Court: (1) the meaning of the Minnesota Supreme Court's "stay of judgment"; (2) the effect of Section 86 of the National Bank Act on petitioner's prayer for injunctive relief; and (3) the enforcement of Minnesota's Bank Credit Card Act against a bank service corporation.

In addition, petitioner also wishes to bring to the Court's attention the recent decision by the Supreme Court of Iowa in *State of Iowa v. First of Omaha Service Corporation*, —— Iowa ——, 269 N.W. 2d 409 (Case No. 203-61053, August 30, 1978). In this decision (reproduced herein at page Add. 1), it was held that the rate of interest charged in connection with the operation of the Omaha BankAmericard program in the State of Iowa is governed by Iowa law and *not* Nebraska law.

ARGUMENT

I. THE MINNESOTA SUPREME COURT'S STAY OF JUDGMENT WAS GRANTED PURSUANT TO 28 U.S.C. §2101 (f) AND WAS A STAY OF THE ENFORCEMENT, NOT THE ENTRY, OF THE JUDGMENT AGAINST PETITIONER.

With respect to the matter of timeliness of the petition for certiorari, respondent argues that the 90-day time limit of 28 U.S.C. §2101(c) should run from the date the Minnesota Supreme Court entered its order denying rehearing (December 8, 1977) instead of the date judgment was entered (December 14, 1977). The theory apparently relied upon by respondent for this conclusion is that the judgment was entered by the Clerk of the Minnesota Supreme Court[1] without authority.

In its Brief on the merits, respondent has taken the position that the "stay of judgment" entered by the Minnesota Supreme Court as part of its order denying rehearing (App. 197) was a stay of the *entry* of judgment and that, accordingly, the judgment should not have been entered. Such an argument not only misconstrues the intent of the Minnesota Supreme Court's Order of December 8, 1977, it also ignores the express provisions of 28 U.S.C. §2101(f). This latter provision states as follows:

> "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, *the execution and enforcement of such judg-*

[1] The case of *Department of Banking v. Pink*, 317 U.S. 264 (1942), reh. den. 318 U.S. 802 (1942), cited by respondent, involved the entry of the judgment by the clerk of *the trial court* on a remittitur from the state appellate court, *after* judgment had been entered by the appellate court. It is inapposite. *Compare, Puget Sound Power & Light Co. v. King County*, 264 U.S. 22 (1924).

ment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay." (Emphasis added.)

In conjunction with the filing of the petition for rehearing to the Minnesota Supreme Court (App. 172), petitioner made a letter request on November 21, 1977 (reproduced herein at Add. 17) that, in the event the court decided to deny the petition for rehearing, an order be entered pursuant to 28 U.S.C. §2101(f) staying "enforcement of the judgment." The Minnesota Supreme Court granted such a stay as a part of its December 8, 1977 Order denying rehearing:

> "3. Respondent Marquette National Bank is herewith granted a stay of judgment pending application for writ of certiorari to the United States Supreme Court. The stay is conditioned upon the filing of a bond in the amount of $10,000 with this court, approved by one of the justices of this court. The stay is further conditioned that if Marquette National Bank fails to make application for writ of certiorari with the United States Supreme Court within the time period allotted therefor or fails to obtain an order granting its application or fails to make its plea good in the United States Supreme Court, it shall answer for all damages and costs which the appellant First of Omaha Service Corporation may sustain by reason of the stay." (App. 197-98).

In the context of petitioner's request for a stay of the enforcement of the judgment pursuant to 28 U.S.C. §2101(f), the only reasonable construction of the Court's reference to "a stay of judgment" is that it was intended as a stay of enforcement and not a stay of entry. As a further indication of this intent, the Court included, as a part of its stay order, the identical conditions set forth in 28 U.S.C. §2101(f).[2]

II. SECTION 86 OF THE NATIONAL BANK ACT DOES NOT PRECLUDE THE INJUNCTIVE RELIEF GRANTED BY THE DISTRICT COURT AGAINST RESPONDENT.

The specific relief granted by the Hennepin County District Court herein was a permanent injunction:

> "enjoining defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the state of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, §48.185." (App. 130).

[2] On March 10, 1978, respondent filed a motion with the Minnesota Supreme Court to vacate the stay on grounds that one of the conditions of the stay, *i. e.*, that petitioner make a timely application for writ of certiorari, had not been met (App. 200). The motion was denied (App. 204). Respondent now attempts to argue that this denial of its motion to vacate the stay should be construed as an indication by the Minnesota Supreme Court that no judgment had been entered. To the contrary, one could assume from denial of respondent's motion that the Minnesota Supreme Court considered the petition for writ of certiorari to have been timely filed, i.e. within ninety (90) days of the entry of judgment.

Respondent asserts in its Brief on the merits that 12 U.S.C. §86 preempts the entry of such a decree.

In this regard, there is no dispute that §86 of the National Bank Act establishes the exclusive *penalty* which may be assessed against a national bank for the collection of usurious interest. *See, e.g., Farmers' & Mechanics' National Bank v. Dearing*, 91 U.S. 29 (1875). Respondent, however, would have §86 construed to also preclude the issuance of an injunction against a national bank threatening to charge usurious interest.

Section 86 of the National Bank Act has never been construed as precluding the remedy of injunctive relief and respondent has failed to cite any authority for this proposition. To the contrary, the only case to address the issue states that, notwithstanding §86, the courts still retain the "equitable power to grant an injunction" against a national bank attempting to charge usurious interest. *Landau v. Chase Manhattan Bank*, 367 F. Supp. 992, 997 (S.D. N.Y. 1973). *Compare, State v. The First National Bank of Clark*, 2 S.D. 568, 51 N.W. 587 (1892), *app. dismissed*, 163 U.S. 686.

Respondent's suggestion that §86 impliedly abrogates the equitable remedy of injunctive relief would not only mean that the courts would be absolutely precluded from enjoining preannounced usurious credit practices of national banks, it would also serve to take away any remedy whatsoever to a competing bank which faces the threat of injury or loss arising out of such a usurious credit program. There is nothing in §86 to support such a construction.

III. MINNESOTA'S BANK CREDIT CARD ACT IS ENFORCEABLE AGAINST RESPONDENT AS THE SUBSIDIARY CREDIT CARD SERVICE CORPORATION OF THE FIRST NATIONAL BANK OF OMAHA.

The final argument raised by respondent in its Brief on the merits is one which was not even made before the Minnesota Supreme Court, *i.e.* whether M.S.A. §48.185 is enforceable against respondent as the subsidiary credit card service corporation of the First National Bank of Omaha. Respondent argues that Minnesota's Bank Credit Card Act may only be enforced against a bank and that, since respondent is not itself a bank, it is not subject to the injunctive relief provided by the statute.[3]

Minnesota's Bank Credit Card Act, M.S.A. §48.185, Subd. 6, prohibits banks from "personally, *or by an agent* or by mail" conducting "a continuous and systematic solicitation" of Minnesota residents to enroll them in a bank credit card program which is not in compliance, from a rate-structure standpoint, with the Minnesota Bank Credit Card Act. (Emphasis added). Furthermore, it is admitted that defendant First of Omaha Service Corporation is a wholly owned subsidiary of the First National Bank of Omaha and the agent of that bank in the State of Minnesota for purposes of soliciting and conducting that bank's credit card program in this State. *See*, Stipulation of Facts, Paragraphs II and III (App. 91-92) and Exhibits A, B and C thereto (App. 97-110).

[3] It is to be noted that by this argument respondent lays to rest any purported significance of 12 U.S.C. §86 in this case. Obviously, if respondent takes the position that no bank is affected by the injunction issued by the District Court, §86 can have no preemptive effect since it only applies to national banks.

Accordingly, there is little question that M.S.A. §48.185 is enforceable against respondent, as the operating credit card subsidiary of the First National Bank of Omaha, so as to enjoin any illegal solicitations or other activities in connection with the Omaha Bank's BankAmericard credit card operations in the State of Minnesota. To construe the statute in any other way would permit a bank to avoid the statute simply by employing agents to conduct its solicitations.

IV. THE PETITIONER'S POSITION HAS BEEN RECENTLY UPHELD BY THE SUPREME COURT OF IOWA IN *STATE OF IOWA v. FIRST OF OMAHA SERVICE CORPORATION, ET AL.*

On August 30, 1978, the Supreme Court of Iowa rejected the preemption arguments made by this same respondent in connection with the introduction of the Omaha BankAmericard program in the State of Iowa. *See, State of Iowa v. First of Omaha Service Corporation, supra* (Add. 1).

In that case, respondent sought to bring the Omaha BankAmericard program into the State of Iowa with the 18 percent per annum interest rate ceiling established under Nebraska law, and to ignore the 15 percent per annum interest rate ceiling established under Iowa law. The Iowa Attorney General brought an action to permanently enjoin such violation of Iowa law (Add. 2). Respondent's defense was the same as espoused herein; namely, that 12 U.S.C. §85 permits the First National Bank of Omaha to charge Nebraska interest rates even when it conducts its BankAmericard program in states other than Nebraska (Add. 5).

The Supreme Court of Iowa granted the requested permanent injunction and ruled that, when conducted in Iowa, the

Omaha BankAmericard program is governed by Iowa's interest rate ceiling (Add. 15). The Court refuse to construe §85 as permitting a national bank to charge its home state's credit card interest rates when it conducts its credit card program in other states:

> "It is our understanding the intended purpose of 12 U.S.C., Section 85, was to insure *intrastate* competitive equality among state lenders and national banks. Consequently, we seriously doubt an interpretation of that statute which would exempt out-of-state national banks from state laws which are applicable to all lenders in a state should be adopted as the law of this state. We decline to do so." (Add. 14).

In so holding, the Supreme Court of Iowa also declined to follow the decisions in the two *Fisher* cases,[4] as well as the decision of the Minnesota Supreme Court herein:

> "If we were to follow the *Fisher* decisions in resolving the problem presented here, we would be compelled to ignore the express public interest this state has in protecting its citizens from excessive finance charges. Application of the *Fisher* extension of 12 U.S.C., section 85, to *interstate* credit transactions would in effect cause that statute to pre-empt the Iowa Consumer Credit Code in this area and carve for out-of-state national bank lenders an exception to the operation of the ICCC. Thus, as stated in somewhat different words, national bank lenders located outside Iowa would not only have 'most favored lender status' in Iowa *but rights greater* than the most favored lender in this state" (Add. 14).

[4] *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284 (7th Cir. 1976), *cert. den.* 429 U.S. 1062 (1977) and *Fisher v. First National Bank of Omaha*, 548 F. 2d 255 (8th Cir. 1977).

This same rationale is applicable in the present case. Under Minnesota law, the highest rate of interest which may be charged by *any lender* in connection with open-end credit transactions (including credit card plans) is 12 percent per annum. *See*, M.S.A. §§48.185 and 334.16.[5] This is to say that no lender in the State of Minnesota is permitted to charge more than 12 percent per annum for this type of credit transaction.[6] Thus, if the decision of the Minnesota Supreme Court is permitted to stand, national bank lenders located outside the State of Minnesota would not only have "most favored lender status" in Minnesota but rights greater than the most favored lender. Such a result would embrace competitive *inequality* rather than competitive equality intended by Congress in enacting §85.

[5] Minnesota's Open End Credit Sales Act (M.S.A. §334.16), reproduced herein at Add. ——, establishes the maximum interest rate permitted non-bank credit card programs. Since it provides for the same 12 percent per annum interest rate ceiling as M.S.A. §48.185, the Open End Credit Sales Act has not been cited by respondent in its "most favored lender" argument. Nevertheless, these two statutes do establish the maximum interest rate permitted any lender in connection with credit card plans conducted in the State of Minnesota.

[6] Respondent would seek to characterize the Omaha BankAmericard program as coming within the type of credit transaction contemplated by Minnesota's Small Loan Act (M.S.A. §56.13). There is, however, nothing in either the statute itself, or in the record herein, to support such a contention. To the contrary, the prohibition against the compounding of interest under the Small Loan Act, M.S.A. §56.13, Subd. 3, effectively segregates "small loan" credit transactions from the open-end credit transactions contemplated under the Minnesota Bank Credit Card Act, M.S.A. §48.185, Subd. 3, whereby interest continues to be applied on a monthly basis to the average daily balance in the customer's account.

CONCLUSION

Based upon the foregoing, and this petitioner's earlier Brief on the merits herein, the Court is respectfully urged to reverse the decision of the Minnesota Supreme Court and order the partial summary judgment of the District Court to be reinstated.

Respectfully submitted,

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ADDENDUM A

IN THE SUPREME COURT OF IOWA

Filed August 30, 1978

STATE OF IOWA ex rel.
RICHARD C. TURNER, ATTORNEY GENERAL,
Appellant,

vs.

FIRST OF OMAHA SERVICE CORPORATION OF
OMAHA, NEBRASKA d/b/a BANK AMERICARD,
AND
CENTRAL NATIONAL BANK & TRUST
COMPANY, DES MOINES, IOWA,
Appellees.

Appeal from the Polk District Court—Harry Perkins, Judge.

Plaintiff appeals from an adverse ruling of the trial court sustaining the motion of both defendants for summary judgment.—Reversed and remanded with directions.

Richard C. Tuner, Attorney General, and Julian B. Garrett, Assistant Attorney General, for appellant.

William E. Morrow, Jr., of Swarr, May, Smith & Andersen, of Omaha, Nebraska, and David A. Scott, of Davis, Scott & Grace, of Des Moines, for appellee First of Omaha Service Corporation.

Kenneth L. Butters of Stewart, Heartney, Brodsky, Thornton & Harvey, of Des Moines, for appellee Central National Bank & Trust Company.

Considered en banc.*

* MASON, J., serving after June 14, 1978, by special assignment.

MASON, J. (Serving after June 14, 1978, by special assignment)

The principal issue presented for review in this appeal is whether the trial court was correct in holding that on the basis of the National Bank Act, 12 U.S.C., section 85, a national bank located in Omaha, Nebraska, may legally charge rates of interest allowed by the laws of Nebraska on loans made to Iowa residents, even though such rates are in excess of the amounts allowed under the Iowa law.

12 U.S.C., section 85, in pertinent parts is as follows:

"Any association [national bank] may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of State, Territory, or District where the bank is located * * * and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter."

This case involves an action brought by the Attorney General seeking an injunction preventing defendants from assessing or collecting a finance charge in excess of that permitted by the Iowa Consumer Credit Code, chapter 537 (ICCA).

Defendant, Central National Bank & Trust Company (Central National) is a national bank located in Iowa. Defendant, First of Omaha Service Corporation (First of Omaha), a Nebraska corporation, is a wholly owned subsidiary of First National Bank of Omaha with its principal place of business in Omaha. It is authorized to, and in fact does, transact business in the State of Iowa.

Defendants are participants in the Bank Americard program. The Bank Americard plan is a national and international credit card system which enables a card holder to purchase goods and services on credit from participating merchants throughout the United States and the world.

The First National Bank of Omaha, which is not a defendant herein, is a national bank located in Omaha, Nebraska, is a card issuing member in the Bank Americard plan, and as such has issued cards to Iowa residents who qualify for them.

Central National, though it does not have authority to issue credit cards or extend credit directly in connection with Bank Americard transactions, does advertise the Bank Americard plan and solicits applications for Bank Americard which are then forwarded to the First National for acceptance or rejection and Central serves as a depository for Bank Americard sales forms deposited by participating merchants with whom First of Omaha has member agreements.

First of Omaha participates in the system by entering into agreements with merchants and banks in Iowa which govern their participation in the system.

Iowa card holders wishing to purchase goods and services or obtain cash loans, sign a Bank Americard form which is authenticated by the card holder's Bank Americard credit card, and exchange the signed form for goods and services or cash from the merchant or bank respectively. These forms are then deposited by the participating merchant in his account with Central National Bank or a similarly functioning bank which then forwards them to First National Bank of Omaha.

Plaintiff, as Attorney General of Iowa, is administrator of the ICCC and is authorized to bring actions to restrain people from violating the act which authorizes temporary relief.

November 1, 1974, plaintiff filed an action in the Polk District Court. His petition as amended is in two divisions. Division 1 seeks temporary and permanent injunctive relief to halt the following three activities of defendants: (1) assessing or collecting of finance charges in excess of the rate allowed by section 537.2402(3) of the ICCC; and (2) engaging in any future violations of sections 537.3205 or 537.2402 of the ICCC; and (3) assisting the First National Bank of Omaha in collecting finance charges which violate section 537.2402(3) of the ICCC. Division 2 of the petition seeks a declaratory judgment to the effect that the acts of defendants constitute a conspiracy to violate the National Bank Act, in particular 12 U.S.C., section 85, which provides that national banks may charge interest at the rate allowed by state law for state banks by the state where the loan is made.

Plaintiff also alleged in his petition as amended defendants had committed two other violations of the Iowa Consumer Credit Code. Plaintiff asserted defendants were assessing their Bank Americard customers a finance charge based on the balance owing at the beginning of the billing cycle without deductions for the payments or credits made during that cycle, in violation of section 537.2402(2), The Code. Plaintiff also claimed section 537.3205, The Code, was violated in that the interest rate was increased without the notice required by that section.

In a stipulation of facts, the parties agreed that the First National Bank of Omaha intended to assess a finance charge at the annual rate of 18 percent on credit extended between $500 and $999.99. Section 537.2402(3), The Code, limits the finance charge on such amounts to an annual rate of 15 percent.

Defendants filed separate answers. Central National generally denied the allegations of the petition and alleged in its answer that the credit extended to Iowa customers was extended outside of Iowa and in Nebraska, and, therefore, Nebraska law controlled. In its answer, defendant First of Omaha asserted 12 U.S.C., section 85, allowed a national bank to charge interest at a rate allowed by the laws of the state where the bank was located and that the rate charged by the First National Bank of Omaha, defendant's parent, as a national bank was legal under 12 U.S.C., section 85, since Nebraska law (section 8.820 Neb. Rev. Statutes, 1973 Supplement) allowed an annual maximum rate of interest of 18 percent to be charged on loans up to $1000.

On November 29, 1974, defendants had the case removed to federal district court, but on October 9, 1975, the case was remanded to the Polk District Court on the grounds that the federal court lacked subject matter jurisdiction. See State of Iowa ex rel. Turner v. First of Omaha S. C., 401 F.Supp. 439 (S.D. Iowa 1975).

October 23, defendants filed an application for separate adjudication of law points, seeking a ruling, in part, that since 12 U.S.C., section 85, applied, Nebraska law controlled the interest that could be charged Iowa residents by the First National Bank of Omaha.

September 3, 1976, the court ruled in part the finance charge which could be assessed by First National Bank of Omaha was limited by the rate ceiling of the Iowa Consumer Credit Code. The court ordered an injunction, restraining defendants from imposing a finance charge of greater than 15 percent on loans between $500 and $1000 as required by Iowa law.

On September 10, defendants filed separate motions for a new trial and corrections of findings of fact and conclusions of law. Defendants stated that the same issue as to which state law should be applied to determine the legal rate of interest which a national bank could charge had been presented in Fisher v. First Nat. Bank of Chicago, 538 F.2d 1284 (7 Cir. 1976), cert. den., 429 U.S. 1062, 97 S.Ct. 786, 50 L.Ed.2d 778, which involved an Illinois national bank and an Iowa borrower. In *Fisher*, the court ruled the law of Illinois controlled the interest rate which a national bank located in Illinois could charge borrowers who were Iowa residents.

On December 20, defendants each filed separate motions for summary judgment, both of which alleged that 12 U.S.C., section 85, mandated Nebraska law was applicable. Plaintiff resisted on the grounds that Federal law should be interpreted to put national banks on the same footing as other lenders making loans in Iowa and not to give national banks located outside of Iowa superiority over all other lenders.

On July 6, 1977, the court granted defendants' motions for summary judgment concluding the *Fisher* case provided sufficient legal precedent for such an action. It is this ruling which gives rise to plaintiff's appeal.

I. Plaintiff contends First National Bank of Omaha's imposition of a finance charge at an annual rate of 18 percent on amounts between $500 and $999.99 is illegal under section 537.2402(3), The Code, which provides:

"3. If the billing cycle is monthly, the charge may not exceed an amount equal to one and one-half percent of that part of the maximum amount pursuant to subsection 2 which is five hundred dollars or less and one and one-fourth percent of that part of the maximum amount which is more than five hundred dollars. If the billing cycle is not monthly, the maximum

charge for the billing cycle shall bear the same relation to the applicable monthly maximum charge as the number of days in the billing cycle bears to three hundred sixty-five divided by twelve. A billing cycle is monthly if the closing date of the cycle is the same date each month or does not vary by more than four days from the regular date."

Defendants, on the other hand, contend Iowa law is not applicable to determine the legal rate of interest which First National Bank of Omaha can impose as a finance charge on the Bank Americard accounts it has with Iowa residents.

This contention is based on defendants' argument that the legal rate which First National Bank of Omaha can charge must be determined under Nebraska law in light of the National Bank Act, 12 U.S.C. section 85, the pertinent part of which has heretofore been set out. They maintain that since First National Bank of Omaha is located in Nebraska, Nebraska law is applicable. Under section 8.820, Neb. Rev. Statutes, 1973 Supplement, a Nebraska bank can charge a finance charge at the annual rate of 18 percent on accounts between $500 and $999.99. Defendants further argue that since First National Bank of Omaha, the parent corporation of First of Omaha, is a national bank, the interest rate it can charge is controlled by 12 U.S.C., section 85.

The contentions of the parties present the problem whether section 85 requires that Nebraska law must be applied to determine the legal interest rate that a Nebraska based national bank can charge Iowa residents or whether Iowa law can be applied to determine the rate of interest which can be charged to Iowa residents.

The Seventh Circuit Court of Appeals interpreted 12 U.S.C., section 85, in Fisher v. First Nat. Bank of Chicago, 538 F.2d at 1291. The question presented in the cited case was whether

Illinois or Iowa law controlled the legal interest rate an Illinois based national bank could charge Iowa residents. A national bank located in Illinois was charging Iowa residents on the unpaid balances of their Bank Americard accounts a finance charge which was legal in Illinois. The court stated that under section 85, "* * * Illinois' 18% per annum statute applies to *all* loans made by the defendant Illinois national banking association, whether made in Illinois or elsewhere, but if the defendant is 'existing' in Iowa and if Iowa allowed, which it apparently does not, a rate of interest to its own state banks in excess of 18%, the defendant could charge such higher rate to the defendant's customers in Iowa." (Emphasis in original).

In reaching the foregoing conclusion, the court rejected an interpretation of section 85 reached in Meadow Brook National Bank v. Recile, 302 F.Supp. 62, 75 E.D. La 1969), where that court held, "12 U.S.C. §85 Fixes the rate of interest chargeable by a national bank only as to loans made in the State where the bank is located, it does not fix the rate of interest which may be charged by a national bank which is located in one state and makes loans in another."

The Seventh Circuit, 538 F.2d at 1290-1291, in refusing to follow this view said:

"We are not inclined to so twist the plain meaning of the statute. It clearly states that the interest on 'any loan' is governed by the rate allowed by the state 'where the bank is located,' which in this case is Illinois."

In Fisher v. First Nat. Bank of Omaha, 548 F.2d 255, 258 (8 Cir. 1977), the court was faced with another action similar to the one faced by the Seventh Circuit except it was the First National Bank of Omaha which was charging interest rates allowable under Nebraska law to Iowa residents on unpaid

balances in Bank Americard accounts the bank had with Iowa residents. The Eighth circuit agreed with the Seventh Circuit's holding in *Fisher v. First Nat. Bank of Chicago* and ruled, "* * * it is clear that the bank is entitled to charge on these transactions the highest permissible Nebraska rate for the same class of loan regardless of whether the loan is made in Nebraska or Iowa since the maximum rate allowable in Iowa is no higher than the maximum rate allowable in Nebraska. If Iowa permitted a higher rate, which it does not, the bank would be entitled to charge the higher rate."

The decisions in the two *Fisher* cases are a result of the rationale that the purpose of 12 U.S.C., section 85, was to give national banks competitive equality with other state lenders and to prevent the states from discriminating against national banks. In Fisher v. First Nat. Bank of Omaha, 548 F.2d at 259, the eighth Circuit Court of Appeals stated:

"12 U.S.C. § 85 was designed by Congress to place national banks on a plane of at least competitive equality with other lenders in the respective states, and, indeed, to give to national banks a possible advantage over state banks in the field of interest rates. Thus, a national bank is not limited to the interest rate that a state bank may charge with respect to a particular type of loan if another lender in the state is permitted to charge a higher rate of interest on the same type of loan. In that situation the national bank may charge the higher rate. This 'most favored lender' doctrine was recognized by the Supreme Court in Tiffany v. National Bank of Missouri, 18 Wall. (85 U.S.) 409, 21 L.Ed. 862 (1873), and it was discussed and applied by this court in First Nat'l Bank in Mena v. Nowlin, 509 F.2d 872 (8th Cir. 1975)."

Plaintiff in response maintains that if, as defendants insist, the First National Bank of Omaha should be allowed to charge

a rate to Iowa residents which no other lender can legally charge, they are not arguing for equality but for superiority over *all* other lenders.

The problem in applying the rationale of the two *Fisher* cases was recognized in Marquette Nat., Etc. v. First of Omaha Serv., —— Minn.2d ——, 262 N.W.2d 358. The Minnesota court was faced with the same issue as involved in the two *Fisher* cases. The Marquette National Bank of Minneapolis sought to enjoin the First National Bank of Omaha and its subsidiary, First of Omaha Service Corporation, a defendant in this case, from issuing Bank Americard credit cards and operating in Minnesota since the First National Bank of Omaha was operating its Bank Americard business in contravention of the Minnesota Credit Card Act (Minn. Stat., section 48.185). The First National Bank of Omaha assessed a finance charge at the annual rate of 18 percent on unpaid balances under $1000 of Bank Americard accounts of Minnesota residents while section 48.185 only permitted an annual maximum rate of 12 percent on credit card accounts.

Since the First National Bank of Omaha was a party, the case was removed to the United States District Court for Minnesota. Marquette thereafter dismissed First National as a party defendant, resulting in the case being remanded back to the state district court because of lack of federal subject matter jurisdiction. The case then proceeded solely against First of Omaha.

The Minnesota court, —— Minn.2d at ——, 262 N.W.2d at 363, before reaching its conclusion, pointed out:

"* * * [W]e have a situation where the Eighth Circuit Court of Appeals, which includes the State of Minnesota, has adopted with approval the view of the Seventh Circuit that a national bank can charge its credit customers an interest

rate allowable in the state where it is physically located, or the interest rate of the state where it is doing business, whichever is higher. At this point, the procedural history of this case assumes a greater importance. It appears fairly obvious that if the Omaha Bank had remained as a party defendant, the Federal District Court for Minnesota or for Nebraska would have followed the opinion of the Eighth Circuit."

The court followed the holdings of the two *Fisher* cases and ruled that First of Omaha could issue Bank Americard cards in Minnesota and charge interest rates allowed by Nebraska law. However, the court, —— Minn.2d at ——, 262 N.W.2d at 365, noted the following about the *Fisher* cases:

"The decisions reached in the *Fisher* cases injected a new attribute into the 'most favored lendor status,' which resulted in allowing the interstate shipment of interest rates by national banks in their credit card programs. This result is accomplished despite the fact that the individual state has attempted to specifically limit the interest rates allowable on certain loan transactions and its laws apply uniformly to the all lending institutions within the state. Thus, by allowing a national bank to transport a given interest rate under these circumstances could afford it a distinct advantage in competing with state banking institutions, an advantage which appears to be contrary to the original purpose in adopting this particular section of the National Bank Act.

"However, we deem it inappropriate for this court to permit the use of procedural devices to obtain a result inconsistent with the existing doctrine in the Eighth Circuit. Consequently, we must reverse the district court's order which enjoins Omaha Service from operating the Omaha Bank's BankAmericard program by charging an interest rate in violation of § 48.185. Consistent with the reasoning in the Fisher cases,

the Omaha Bank may assess an interest rate to its BankAmericard customers in Minnesota which complies with the applicable Nebraska statutory interest rate. See, Neb.Rev.Stat. § 8-820."

The procedural history described in *Marquette* which appears to have been a compelling reason for the result reached by the majority is not a factor to be considered in resolving the case before us.

May 22, 1978, the United States Supreme Court granted a petition for writ of certiorari in the *Marquette National Bank* case.

In United Missouri Bank of Kansas City v. Danforth, 394 F.Supp. 774 (W.D. Mo. 1975), cited by the Eighth Circuit in *Fisher*, 548 F.2d at 259, plaintiffs were all national banking associations created and operating under the National Banking Act, 12 U.S.C., Section 21, and were all located in the state of Missouri. In *Danforth* plaintiffs sought a declaratory judgment that the Missouri Retail Credit Sales Act was not applicable to plaintiffs' bank credit card system by reason of the provisions of 12 U.S.C., section 85. The question presented related to whether the provisions of the Act excepting licensees under chapter 367, RSMo, from the definition of "retail seller" or "Seller" also excepts plaintiffs from that definition by operation of section 85 of Title 12.

We perceive no reason, at least at the present time, to disagree with the holding in the cited case. However, we call attention to the fact the credit transactions involved in *Danforth* were *intrastate* whereas in the case before us the transactions involved were *interstate*.

In considering the problem presented by this appeal we recognize the rate of interest that a national bank may charge is ultimately a question of federal law, and the matter is

governed by 12 U.S.C., section 85. Fisher v. First Nat. Bank of Omaha, 548 F.2d at 257.

As indicated, Iowa enacted a Consumer Credit Code consisting of sections 537.1101 to 537.7103, which were added by the 1974 Regular Session, Sixty-fifth General Assembly, chapter 1250, sections 1.101 to 7.103, to become effective July 1, 1974. Section 537.2402(3) limits the finance charge on credit extended between $500 and $999.99 to an annual rate of 15 percent.

At the time of the occurrence of the events giving rise to the *Fisher* cases Iowa did not have the ICCC.

We must decide whether a national bank engaged in *interstate* business of credit card financing should be able to avoid the provisions of Iowa law relating to allowable interest rates.

Although we believe the dissent by Justice Scott in *Marquette*, concurred in by Justices Yetka and Wahl, presents a more rational approach to a resolution of the problem, we think there is merit in the majority's view in *Marquette* that the decision reached in the *Fisher* cases injected a new attribute into the "most favored lender status." In our opinion, this newly injected attribute, in the factual situation presented in the case before us, results in not only affording a national bank Nebraska lender a competitive equality with all other Iowa lenders including national banks located in this state in making similar types of loans in this state to Iowa residents, but it also results in affording a national bank Nebraska lender a superior advantage over all other lenders in competing for Bank Americard types of loans to be made in Iowa to Iowa residents which might well become "an unreasonable and destructive advantage" over all other lenders in this state.

The *Fisher* interpretation not only serves to permit a national bank Nebraska lender to assess the highest rate charged

by any person or entity in Iowa under like conditions, but it also permits a national bank Nebraska lender to charge a higher rate than the maximum permitted by the ICCC for all lenders for similar loans.

This appears to us to be contrary to the original purpose in adopting section 85 of the National Bank Act which was to impose the same interest ceiling on national banks as on the most favored lenders in the state without giving them an unconscionable and destructive advantage over all other state lenders in making similar types of loans.

In light of the fact that since July 1, 1974, Iowa has had a Consumer Credit Code which it did not have at the time of the occurrence of the events giving rise to the *Fisher* cases, it is our opinion that to apply the *Fisher* courts' view as to the effect of 12 U.S.C., section 85, to *interstate* credit transactions is an unwarranted extension of the "most favored lender status." If we were to follow the *Fisher* decisions in resolving the problem presented here, we would be compelled to ignore the express public interest this state has in protecting its citizens from excessive finance charges. Application of the *Fisher* extension of 12 U.S.C., section 85, to *interstate* credit transactions would in effect cause that statute to pre-empt the Iowa Consumer Credit Code in this area and carve for out-of-state national banks lenders an exception to the operation of the ICCC. Thus, as stated in somewhat different words, national bank lenders located outside Iowa would not only have "most favored lender status" in Iowa *but rights greater* than the most favored lender in this state.

It is our understanding the intended purpose of 12 U.S.C., section 85, was to insure *intrastate* competitive equality among state lenders and national banks. Consequently, we seriously doubt an interpretation of that statute which would exempt

out-of-state national banks from state laws which are applicable to all lenders in a state should be adopted as the law of this state. We decline to do so.

In regard to defendants' concern that the foregoing view would somehow result in the ICCC becoming the law of Nebraska, we find such anxiety is without basis. We are not saying the ICCC governs lending institutions doing business in Nebraska. What we do say is that national bank Nebraska lenders must adhere to the interest ceiling applying to *all* lenders making loans in the state of Iowa to Iowa residents for similar types of credit.

The trial court erred in granting defendants' motion for summary judgment.

With directions to the trial court to set aside its order of July 6, 1977, granting defendants' motion for summary judgment and to reinstate its order of September 3, 1976, determining the merits of plaintiff's claim for relief and to proceed with such steps as may be necessary to carry out such order, the case is—Reversed and remanded.

All Justices concur except LeGrand and Rees, JJ., who dissent, and Allbee and McGiverin, JJ., who take no part.

No. 203

State of Iowa vs.

First of Omaha Service Corp.

LeGrand, J. (dissenting)

No matter how anxious we might be to "protect" Iowa credit-consumers from paying a higher rate of interest, the majority opinion is clearly contrary to the provisions of the applicable federal law governing interest rates chargeable by national banks. (12 U.S.C. §85). I agree with the Seventh Circuit Court of Appeals when it said, in discussing this same

problem, any other result would be "to twist the plain meaning of the statute." Fisher v. First National Bank of Chicago, 538 F.2d 1284, 1290-91 (7th Cir. 1976), cert. den. 429 U.S. 1062, 97 S.Ct. 786, 50 L.Ed. 2d 778. The Eighth Circuit Court of Apeals reached the same conclusion in Fisher v. First National Bank of Omaha, 548 F.2d 255, 257 (1977), as did the Supreme Court of Minnesota—reluctantly but inevitably—in The Marquette National Bank of Minneapolis v. First of Omaha Service Corp., 262 N.W.2d 358 (Minn. 1977).

Both the statute itself and the cases which have considered it (with one federal district court exception cited in the majority opinion) require a holding that Iowa interest rates do not limit what defendants may charge. I find it strange that the majority concedes this in one breath by saying the rate of interest to be charged is "ultimately a question of federal law" while in the next it refuse to apply the statute according to its plain dictates.

The majority seems to have adopted the State's argument that allowing defendants to charge a higher rate of interest gives them an advantage over other lenders. Really the contrary is true. Certainly there is no difficulty today in obtaining credit cards; the problem is to avoid getting them. If this is true, defendants should be at a disadvantage when they overprice their commodity—credit—in a highly competitive market. There are, indeed, many areas in which consumers need protection, but this is not one of them. See special concurrence in *Marquette National Bank* at 262 N.W.2d, page 365.

I would affirm the trial court.

REES, J., joins in this dissent.

ADDENDUM B

LAW OFFICES OF
LEVITT, PALMER, BOWEN, BEARMON & ROTMAN
500 Roanoke Building
Minneapolis, Minnesota 55402
612—339-0661

November 21, 1977

Honorable Robert J. Sheran
Chief Justice, The Supreme
Court of Minnesota
State Capitol Building
St. Paul, Minnesota 55101

Re: The Marquette National Bank of Minneapolis v. First of Omaha Service Corporation File No. 47561

Dear Justice Sheran:

The Marquette National Bank of Minneapolis ("Marquette") has caused to be filed today with the Clerk of the Minnesota Supreme Court Petition for Rehearing in connection with the above-referenced matter. We enclose herewith a copy of the Petition for Rehearing. We understand the filing of the Petition for Rehearing stays the entry of judgment in this matter until disposition of the petition.

In the event the Petition for Rehearing is denied, Marquette intends to apply to the United States Supreme Court for Writ of Certiorari under 28 U.S.C. §1257(3). Under 28 U.S.C. §2101 (c), Marquette is required to file application for such Writ of Certiorari within 90 days after the entry of judgment in the above-referenced matter.

28 U.S.C. §2101(f) provides:

> "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ

of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a Justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or Justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay."

In the event the Minnesota Supreme Court elects to deny Marquette's Petition for Rehearing, we request that enforcement of the judgment of the Minnesota Supreme Court (lifting of the lower court's permanent injunction) be stayed for a reasonable time to permit Marquette to obtain a Writ of Certiorari from the Supreme Court.

Marquette has posted bond with Hennepin County District Court in the amount of $10,000 as a condition to that court's granting of permanent injunctive relief. We are prepared to post the same bond with the Minnesota Supreme Court or such other bond as may be required.

Very truly yours,
LEVITT, PALMER, BOWEN,
BEARMON & ROTMAN
By John Troyer

JT/cn

cc: Clay Moore
William E. Morrow, Jr.
Richard Allyn
Dale Harris

ADDENDUM C

Minnesota Statutes, Section 334.16

Subdivision 1. Limitation of rates. The imposition, charge or collection of a finance charge upon an account balance by a seller of goods, services or both shall be lawful, provided that:

(a) The sale is a consumer credit sale pursuant to an open end credit plan, agreement or arrangement between the buyer and seller under which (1) the seller may permit the buyer to make purchases from time to time from the seller or other sellers, (2) the buyer has the privilege of paying the balance in full or in installments, and (3) a finance charge may be computed by the seller from time to time on an outstanding unpaid balance; and

(b) The terms of the plan, agreement or arrangement provide for a periodic rate of finance charge which does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle; provided a minimum finance charge not in excess of 50 cents per month may be imposed, charged or collected.

Subd. 2. Definitions and computations. The definitions and the provisions on computation of percentage rates in the Truth-in-Lending Act, Title I of the Consumer Credit Protection Act, P.L. 90-321,[1] and in Regulation Z of the Board of Governors of the Federal Reserve System adopted pursuant thereto, 12 CFR 226, as in effect on June 5, 1971 shall apply to the terms used in sections 334.16 to 334.18, and computations thereunder.

Laws 1971, c. 877, §1.